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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36037

TRI-CITY RAILROAD COMPANY, LLC—PETITION FOR DECLARATORY ORDER

Digest:[1] In this decision, the Board denies a petition for declaratory order filed by Tri-City Railroad Company, LLC, regarding the nature of certain track serving an industrial park that the City of Richland owns, the need for Board authority on that track, and the effect of certain terms of the track use agreements under which BNSF Railway Company and Union Pacific Railroad Company operate over the track.

Decided: May 31, 2017

On May 25, 2016, Tri-City Railroad Company, LLC (TCRY), a Class III rail carrier, filed a petition requesting that the Board issue a declaratory order ruling on a number of issues pertaining to certain rail track owned by the City of Richland (Richland) in the State of Washington, known as the Horn Rapids Spur (the H.R. Spur). TCRY seeks a ruling that: (1) the H.R. Spur is a railroad line subject to the entry licensing requirements of 49 U.S.C. § 10901; (2) Richland failed to obtain entry licensing authority under § 10901 to construct the H.R. Spur; (3) Richland has retained enough control over rail operations on the H.R. Spur to make it a rail carrier; (4) Richland failed to obtain Board authority to cross TCRY's line under § 10901(d); (5) Richland's track use agreements with BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) contain "unauthorized" interchange commitments; and (6) certain provisions in Richland's track use agreement with BNSF were drafted to avoid the Board's jurisdiction and are therefore void ab initio. (TCRY Pet. 33-34.) For the reasons discussed below, TCRY's petition for declaratory order will be denied.

BACKGROUND

The H.R. Spur was constructed by Richland in 1999 as part of its Horn Rapids Industrial Park. (TCRY Pet. 7; Richland Reply 3-4, V.S. Rogalsky 1.) The H.R. Spur is 10,322 feet long and stub-ended. (Richland Reply 2.) At its eastern end, the H.R. Spur connects with a mainline

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

known as the Hanford Trackage,[2] which is owned by the Port of Benton and leased by TCRY. (TCRY Pet. 7-8; Richland Reply 2); see also Tri-City R.R.—Lease & Operation Exemption—Rail Line of the Port of Benton in Richland, Wash., FD 33888 (STB served June 23, 2000). BNSF and UP also have trackage rights over the Hanford Trackage.[3]

In 2001, TCRY entered into a temporary service agreement with Richland to operate over the H.R. Spur. (TCRY Pet. 8, V.S. Peterson Ex. 9; Richland Reply 4.) TCRY states that it provided service to several industries along the H.R. Spur from 2002 through 2009. (TCRY Pet. 8.) Specifically, TCRY transported carload traffic to and from industries located along the H.R. Spur and exchanged that traffic with BNSF or UP at the southern end of the Hanford Trackage. (Richland Reply 4; see also TCRY Pet. 9-10, 12.) According to TCRY, BNSF began providing direct service to shippers on the H.R. Spur in 2009. (TCRY Pet. 16.)

TCRY states that in December 2010, Richland terminated its temporary service agreement with TCRY. (Id. at 9.) TCRY states that Richland demanded that TCRY agree to eliminate its only passing track on its system (so that Richland could construct a new at-grade crossing[4] unrelated to this case) and that TCRY pay an access fee going forward to serve customers on the H.R. Spur. (Id.) TCRY states that it refused to sign the agreement. (Id.) According to TCRY, Richland then "banned" TCRY from accessing any shippers on the H.R. Spur. (Id.)

TCRY adds that Richland entered into an agreement with BNSF on January 5, 2011, which provides, among other things, that BNSF would cease doing business with TCRY at TCRY's interchange location on the Hanford Trackage. (TCRY Pet. 10.) TCRY further states that Richland entered into a similar agreement with UP in April 2011. (Id.) TCRY currently operates over the H.R. Spur as UP's handling carrier, (Richland Reply 5), though as noted, not pursuant to a service agreement with Richland. TCRY states that there are 13 shippers on the

[2] In its reply, Richland refers to the Hanford Trackage as the Southern Connection. (See Richland Reply 2.)

[3] BNSF's and UP's trackage rights over the Hanford Trackage date back to 1947, when the United States Atomic Energy Commission entered into an agreement with Northern Pacific Railway Company (predecessor to BNSF) and UP to establish service to the Hanford Nuclear Reservation. See BNSF Ry. v. Tri-City & Olympia R.R., 835 F. Supp. 2d 1056, 1058 (E.D. Wash. 2011). The Board's predecessor, the Interstate Commerce Commission (ICC), authorized the railroads' joint operating rights in 1948. See N. Pac. R.R., et al. Trackage Rights etc., FD 15925, slip op. at 15 (ICC served Sept. 28, 1948). A second agreement was entered into between the United States Atomic Energy Commission and the railroads in 1961. See BNSF Ry. v. Tri-City, 835 F. Supp. 2d at 1059. In 1998, the United States, acting through the Department of Energy, conveyed ownership of a six-mile section of the track to the Port of Benton, thereby assigning the rights granted in the 1947 and 1961 agreements with BNSF and UP to the Port of Benton. Id. at 1060.

[4] The proposed at-grade crossing was the subject of another Board proceeding, Tri-City Railroad Company—Petition for Declaratory Order, FD 35915 (STB served Sept. 14, 2016).

H.R. Spur and Richland continues to advertise sale of commercial property along the H.R. Spur. (TCRY Pet. at 14, 16.)

POSITIONS OF THE PARTIES

TCRY argues that the H.R. Spur is mainline track subject to Board licensing and that Richland therefore needed to obtain authority from the Board under § 10901 to construct and operate the H.R. Spur, (TCRY Pet. 20, 25-26); that Richland has retained enough control over BNSF and UP rail operations on the H.R. Spur to make Richland a rail carrier, (Id. at 28, 30); that Richland failed to obtain authority under § 10901(d) to cross the Hanford Trackage to reach the H.R. Spur, (Id. at 27); that Richland should be required to comply with § 10901(d) as a condition precedent to receiving any further rail traffic that must cross the Hanford Trackage to reach the H.R. Spur, (Id. at 28); that Richland's track use agreements with BNSF and UP contain "unauthorized" interchange commitments that prohibit BNSF and UP from interchanging with TCRY on the Hanford Trackage, (Id. at 30, 32); and that certain provisions in Richland's track use agreement with BNSF were drafted in an attempt to avoid the Board's jurisdiction and therefore should be found to be void ab initio, (Id. at 33).

Richland filed a reply to TCRY's petition on July 14, 2016, arguing that there is no reason for the Board to move forward with a declaratory order proceeding because no genuine case or controversy warranting Board intervention exists. (Richland Reply 3.) Richland states that it does not hold itself out to the public to be a railroad common carrier and contends that the H.R. Spur is not a Board-regulated mainline. (Id.) Rather, Richland argues, the H.R. Spur is and has always been private track outside of the Board's jurisdiction. (Id. at 6.) Moreover, Richland asserts that the Board need not rule on the alleged crossing and interchange commitment issues because TCRY's arguments on both issues fundamentally misstate the applicable law and Board regulations. (Id. at 3.)

BNSF also filed a reply in opposition to TCRY's petition on July 14, 2016. According to BNSF, TCRY presents no uncertainty or controversy warranting Board involvement, but rather the petition is an attempt by TCRY to interfere with the lawful rail operations of its competitors and monopolize rail service on the H.R. Spur and the Hanford Trackage. (BNSF Reply 5.) BNSF further argues that TCRY's allegations concerning the need for crossing authority lack merit. (Id. at 7.) According to BNSF, both BNSF and UP have independent authority, through trackage rights granted by the ICC in Northern Pacific Railroad Co. et al. Trackage Rights etc., FD 15925, to operate over the Hanford Trackage and thus do not need additional authority to cross that trackage to serve customers on the H.R. Spur. (Id.) BNSF also asserts that Richland's agreements with BNSF and UP contain no interchange commitment within the meaning of 49 C.F.R. § 1121.3(d). (Id. at 8.) Rather, BNSF claims that the agreements referenced by TCRY simply identify the location where interchanges shall take place. (Id.)

DISCUSSION AND CONCLUSIONS

Declaratory Order Jurisdiction. Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. We have

broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). For the reasons discussed in more detail below, the Board will deny TCRY's petition for declaratory order.

Track Classification and the Need for Board Authority. TCRY seeks a ruling that the H.R. Spur is mainline track for which Richland required construction and operation authority from the Board. TCRY's arguments lacks merit. Mainline track is within the Board's jurisdiction and is subject to the entry licensing requirements of 49 U.S.C. § 10901. Excepted track, on the other hand, is also within the Board's jurisdiction, 49 U.S.C. § 10501(b), but under § 10906, Board authorization is not required for the construction, operation, abandonment, or discontinuance of such track. Jersey Marine Rail—Pet. for Declaratory Order, FD 36063, slip op. at 2 n.3 (STB served Jan. 30, 2017); Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4 (STB served Feb. 19, 2014).[5] In determining whether a particular track is mainline subject to Board licensing or excepted track, the agency and courts consider the track's intended use, physical characteristics, relationship to the rail system, and history. See JGB Props., FD 35817, slip op. at 6-7; ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co. (ParkSierra), FD 34126 et al., slip op. at 5 (STB served Dec. 26, 2001). The Board's decisions have relied on certain indicia, including the length of the track; whether it serves more than one shipper; whether it is stub-ended; whether it was built to penetrate new markets; whether the shipper is located at the end of the track; whether there is regularly scheduled service; traffic volume; who owns and maintains the track; whether the track was constructed with light-weight rail; the condition of the track; what the track is used for (e.g., switching, loading, and unloading); and whether there are stations on the track.[6]

In this case, the record demonstrates that the H.R. Spur has the use and characteristics of excepted track under § 10906. With respect to its use, the record shows that the H.R. Spur was constructed to provide shippers in Richland's industrial park with access to the Hanford Trackage and is currently used by BNSF and UP for that purpose. The Hanford Trackage has been used to provide common carrier rail service to the Richland area since the 1940s, long before the H.R. Spur was constructed.[7] In fact, in its 1948 decision, the ICC recognized that BNSF's and UP's "common carrier services will be used by business establishments now

[5] Track does not need to be built by a rail carrier to qualify as excepted track. See JGB Props. LLC—Pet. for Declaratory Order, FD 35817, slip op. at 8 n.11 (STB served Dec. 10, 2015) (rejecting the argument that excepted track can only be built by a rail carrier).

[6] See ParkSierra, FD 34126 et al.; Chi. SouthShore & S. Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind., FD 33522 (STB served Dec. 17, 1998); S. Pac. Transp. Co.—Exemption—Aban. of Serv. in San Mateo Cty., Cal., AB 12 (Sub-No. 118X) (ICC served Feb. 20, 1991) (revoking abandonment exemption because trackage was excepted track).

[7] The ICC viewed the trackage now known as the Hanford Trackage as mainline subject to agency licensing. See N. Pac. R.R., et al. Trackage Rights etc., FD 15925, slip op. at 13.

located, or to be located, at Richland." N. Pac. R.R., et al. Trackage Rights etc., FD 15925 at 13 (emphasis added). Thus, the industrial park at Richland is not a new market for BNSF and UP; rather, it is a market that they have served for several decades, even though the industrial park and its tenants have since located in this market. Indeed, the industrial park is exactly the sort of "business establishment[] . . . to be located" on the Hanford Trackage that the ICC contemplated when it licensed BNSF and UP to operate there in 1948. Id. TCRY claims that the H.R. Spur must be a regulated mainline because there is no loading, storage, or switching, which are activities often associated with excepted track. Here, despite the fact that no loading, storage, and switching take place on the track, the record nonetheless indicates that operations on the H.R. Spur, which provide shippers in the industrial park with access to the adjacent mainline, are merely ancillary to the common carrier service provided on the Hanford Trackage.

The H.R. Spur's characteristics also support the conclusion that it is excepted track. For instance, the H.R. Spur is less than two miles in length,[8] it is stub-ended (so there is no overhead service on it), and it has no mileposts. There is also no evidence of any stations on the H.R. Spur. These are classic indicia of excepted track. TCRY points to other characteristics of the H.R. Spur that could lead to the conclusion that the H.R. Spur is mainline. It notes that there are 13 shippers on the H.R. Spur and that the H.R. Spur had a carload volume of 6,074 between January 2013 and May 2016. However, track with multiple shippers can qualify as excepted track under § 10906 if it is ancillary to a mainline. JGB Props., FD 35817, slip op. at 8 n.12 (citing Great N. Ry. Aban., 247 I.C.C. 407, 408 (1941)); see also S. Pac. Transp. Co.—Exemption—Aban. of Serv. in San Mateo Cty, Cal., AB 12 (Sub-No. 118X) (ICC served Feb. 20, 1991). The volume and the number of shippers simply reflect that the industrial park is busy, but that fact, when considered with the other factors discussed above, does not change the ancillary nature of the track.

The track cannot be private track, as Richland argues in its reply. Typically, private track is used by the track's owner for movement of its own goods (either by utilizing its own equipment or by contracting for service), and there is no common carrier obligation to serve other shippers that might locate along the line.[9] B. Willis—Pet. for Declaratory Order, 6 S.T.B.

[8] See ParkSierra, FD 34126 et al., slip op. at 6 (finding that 1.7-mile track is ancillary).

[9] The Board has also granted, under certain circumstances, requests by rail carriers to abandon a mainline (and extinguish the associated common carrier obligation) with the intention of ultimately continuing to serve a limited number of shippers under contract on the then-private track. See, e.g., Union Pac. R.R.—Abandonment Exemption—in Pottawattamie Cty., Iowa, AB 33 (Sub-No. 300X), et al. (STB served Jan. 20, 2012) (where one shipper purchased the line and the other shipper received a permanent access easement—protective measures that mitigated the removal of the common carrier obligation); Consol. Rail Corp.—Petition for Declaratory Order (Conrail), 1 I.C.C.2d 284 (1984) (post-abandonment movement of overhead or bridge traffic on a nonregulated, non-common carrier, strictly contractual basis found not subject to ICC jurisdiction). Recently, however, the Board has expressed its concern with continued reliance on the analysis applied in Conrail and similar cases given the significant changes in the rail industry since the ICC decided Conrail in 1984. See Energy Sols., LLC, dba Heritage R.R.—Aban. Exemption—in Anderson & Roane Ctys., Tenn., AB 1128X (STB served Oct. 13, 2015).

280, 281 (2002), reh'g denied sub nom. B. Willis v. STB, 51 Fed. App'x 321 (D.C. Cir. 2003); see also Allied Erecting & Dismantling Co. v. STB, 835 F.3d 548, 550 (6th Cir. 2016). Here, the H.R. Spur was never used by Richland for movement of Richland's own goods. Richland itself states that there are currently seven industries in the industrial park with industry track connections, some of which are used by multiple shippers. (Richland Reply, V.S. Rogalsky 3.)

Thus, because the H.R. Spur is excepted track, and because the construction, operation, abandonment, and discontinuance of excepted track does not require Board authorization, Richland did not require authority from the Board to construct or operate the H.R. Spur.

Richland's Status. TCRY also argues that Richland has retained enough control over rail operations on the H.R. Spur to make Richland a rail carrier. However, there is no allegation here of interference with the provision of rail service on the H.R. Spur, and no shipper on the H.R. Spur has complained that it has been deprived of rail service. Thus, there is no apparent need for the Board to consider this question. Moreover, the Board fully recognizes the public benefit of economic development, such as rail-served industrial parks, and does not wish to discourage such investments through unnecessary regulation. See 49 U.S.C. § 10101. Under the circumstances, it is unnecessary for the Board to interfere in a negotiated business arrangement to examine specific provisions of the track use agreements governing operations on excepted track over which the Board has no licensing authority, and the Board therefore will exercise its discretion not to opine on this issue.

Crossing Authority. TCRY's claims that Richland failed to obtain Board authority to cross the Hanford Trackage to serve shippers on the H.R. Spur under § 10901(d) also lack merit. Under § 10901(d), when the Board has authorized a rail line construction, no other carrier may block the construction by refusing to permit the carrier to cross its property, provided that the construction and subsequent operation do not unreasonably interfere with the operation of the crossed line and the line owner is compensated. In support of its claim, TCRY relies on HolRail LLC—Construction & Operation Exemption—in Orangeburg & Dorchester Counties, S.C., FD 34421 et al., slip op. at 5 (STB served Feb. 12, 2007), aff'd sub nom. HolRail, LLC v. STB, 515 F.3d 1313, 1316 (D.C. Cir. 2008), a case in which the Board denied a petition to construct and operate a new rail line, where the line would be built at least partially within the right-of-way of another carrier.[10]

TCRY has not supported its claim that the provisions of § 10901(d) apply. TCRY has not shown that Richland "crossed" the Hanford Trackage during the construction of the H.R. Spur. Moreover, Richland neither provides common carrier service that traverses the Hanford

[10] In HolRail, the Board found that the petitioner's request did not come within the intended scope and purpose of § 10901(d), stating, "[t]here is no indication that by enacting the crossing statute Congress meant to provide a means by which a new carrier could avail itself of a significant portion of an incumbent carrier's right-of-way in lieu of obtaining its own right-of-way, regardless of the difficulties it would otherwise face." HolRail, FD 34421 et al., slip op. at 5.

Trackage, (see Richland Reply 13), nor arranges for service to be provided for the shippers on the H.R. Spur, (see TCRY Pet. V.S. Peterson 8). Even if the crossing statute applied in this case, the record does not demonstrate that the construction or operation of the H.R. Spur unreasonably interfered with TCRY's operations over the Hanford Trackage.[11]

The Board's crossing statute is likewise not applicable to BNSF and UP operations over the Hanford Trackage. As noted above, BNSF's and UP's operating rights over the Hanford Trackage date back to agreements entered into in 1947 and 1961. See supra note 3. In 2011, the U.S. District Court for the Eastern District of Washington held that the 1947 and 1961 agreements granted BNSF's predecessor and UP the right to operate on the Hanford Trackage and that TCRY's 2002 lease of the Hanford Trackage was entered into subject to those rights. BNSF Ry. v. Tri-City, 835 F. Supp. 2d at 1066-67. Therefore, unlike the petitioner in HolRail, not only do BNSF and UP possess independent authority to operate over the Hanford Trackage, BNSF's and UP's authority precedes TCRY's rights.

Interchange Commitments. TCRY also claims that Richland's track use agreements with BNSF and UP contain unauthorized interchange commitments, citing 49 C.F.R. § 1121.3(d). Interchange commitments are "contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad." See Info. Required in Notices & Pets. Containing Interchange Commitments, EP 714, slip op. at 1 n.2 (STB served Nov. 26, 2013) (citing Review of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League, EP 575, slip op. at 1 (STB served Oct. 30, 2007)). The Board's regulations at 49 C.F.R.§ 1121.3(d) and § 1150.33(h) impose certain disclosure requirements for notices and petitions for exemption where the underlying lease or line sale includes an interchange commitment.

The Board's regulations regarding interchange commitments apply only to "a proposed acquisition or operation of a rail line." See 49 C.F.R. §§ 1121.3(d), 1150.33(h), 1150.43(h), 1180.4(g)(4) (emphasis added). As noted above, the H.R. Spur has the use and characteristics of excepted track and is therefore not a "rail line." Accordingly, the Board's regulations regarding interchange commitments do not apply in this case.

Contractual Attempts to Avoid Board Jurisdiction. Finally, TCRY argues that certain provisions in Richland's track use agreement with BNSF were expressly drafted to avoid the Board's jurisdiction and should therefore be void ab initio. In support of that claim, TCRY points to Section 9.2, which states that the parties agree that the track is excepted track under § 10906, and Section 17.2, which states that the parties agree that the rights and obligations under the agreement shall not be deemed an interchange commitment. (TCRY Pet. 32-33.) Richland responds that Section 9.2 memorializes the parties' understanding that the H.R. Spur is private "industry" track. (Richland Reply 22 n.38.)

[11] The Board notes that TCRY first raised this argument 17 years after the H.R. Spur was constructed, which includes approximately nine years where TCRY operated over the H.R. Spur itself pursuant to a temporary service agreement with Richland.

Even if the parties did structure their transaction so as to bring it within (or exclude it from) the Board's jurisdiction, the determination of what is or is not under the Board's jurisdiction does not turn on the label placed on the segment by the parties. See Battaglia Distrib. Co. v. Burlington N. R.R., FD 32058, slip op. at 3 n.9 (STB served June 27, 1997) (citing Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983)); Cent. Cal. Traction Co.—Pet. for Declaratory Order—City of Lodi, FD 32776 (STB served June 27, 1996). In other words, how the parties refer to the H.R. Spur in their agreements is not dispositive of the nature of the track or the need for authority. Rather, classification of track depends on its use and characteristics, and as discussed above, the Board finds that the use and characteristics of the H.R. Spur are that of excepted track.

Conclusion. For the above reasons, the Board finds that the H.R. Spur has the use and characteristics of excepted track under § 10906; Richland did not require Board authority to construct or operate the H.R. Spur; TCRY has not shown that the "crossing" provisions of § 10901(d) apply in this case; the Board's regulations regarding interchange commitments do not apply to the H.R. Spur because it is not a "rail line;" and TCRY has not established that certain provisions of Richland's track use agreement with BNSF were drafted in an improper attempt to avoid Board jurisdiction. Accordingly, TCRY's petition for declaratory order is denied.

It is ordered:

1. The petition for declaratory order is denied.

2. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.